No. 41885-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DENNIS MCDANIEL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Susan J. Serko

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In violation of McDaniel's Sixth Amendment and article I, sections 21 and 22 right to a jury trial and Fourteenth Amendment and article I, section 3 right to due process, the trial court erroneously admitted testimony and evidence which vouched for the credibility of the complaining witness and offered an opinion as to guilt.

2. In violation of McDaniel's Sixth Amendment right to present a defense and to confrontation, the trial court erred in barring McDaniel from questioning the complainant's mother regarding her erratic lifestyle and a Child Protective Services ("CPS") investigation of her parenting of the complainant.

3. The prosecutor committed misconduct that violated the Fourteenth Amendment guarantee of due process when she capitalized on the in limine order barring McDaniel from eliciting evidence of the complainant's mother's erratic lifestyle and the CPS investigation of her parenting.

4. McDaniel was denied his right to a speedy trial secured by CrR 3.3, the Sixth Amendment and article I, section 22.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. No witness is permitted to offer an opinion on an ultimate issue to be decided by the jury; such testimony invades the province of the jury and violates the Sixth Amendment and the Washington Constitution's "inviolate" right to trial by jury. Did testimony by a forensic child interviewer regarding how she ensures alleged child victims of sexual abuse know to tell the "truth" and not a "lie," that her "training" enables her to determine when a crime has occurred, and that she has successfully determined when children are not being truthful constitute impermissible bolstering of the complainant's testimony and an unconstitutional opinion as to McDaniel's guilt? (Assignment of Error 1)

2. An accused person's Sixth Amendment and article I, section 22 right to a defense permit him to introduce even minimally relevant evidence that helps him to present his theory of the case. The trial court barred McDaniel from introducing evidence of the erratic lifestyle, drug addiction, neglect, and ensuing CPS investigation of the mother of the alleged child victim, even though this evidence was relevant to show her bias and motivation for aiding the State's prosecution. Did the court's ruling deny McDaniel his right to a defense? (Assignment of Error 2)

3. Having successfully prevailed on the trial court to exclude evidence of the mother's neglect of the preschool-aged complainant, the trial prosecutor repeatedly urged the jury to conclude that a resurgence of the complainant's bedwetting after having been potty trained was caused by the charged incident of molestation. Such behavior is a generalized indicator of anxiety rather than a specific indicator of sexual abuse. Where the prosecutor was aware of the alternative explanation for the child's behavior and deliberately fostered a false impression on the part of the jury, and the evidence at trial was otherwise inconclusive, should this Court conclude the prosecutor engaged in misconduct that denied McDaniel a fair trial? (Assignment of Error 3)

4. The right to a speedy trial is safeguarded by court rule, the Sixth Amendment, and the Washington Constitution. A violation of the right requires dismissal with prejudice. The court did not make a record of the reasons for at least two continuances and, with respect to two others, (a) granted a continuance based on "witness unavailability" without a showing that the witnesses had been subpoenaed, and (b) granted a continuance based on courtroom unavailability without a showing that there was no other

department to hear the matter. Must McDaniel's conviction be reversed and dismissed with prejudice?

C. STATEMENT OF THE CASE

Appellant Dennis McDaniel met Rachel McCutcheon in the spring of 2006, and within a month they were dating. RP 723.[1] McCutcheon had a daughter, C.D. (D.O.B. 10/18/04), who was about a year and a half old when McCutcheon and McDaniel met. RP 725. McDaniel and McCutcheon moved in together in Seattle soon after they started dating but broke up in February 2007. RP 727.

A month later McDaniel met Teresa Russell, his current fiancée, and by April 2007 Russell was pregnant with McDaniel's child. RP 727-28. Russell and McDaniel lived together in a home that McDaniel was remodeling in Tacoma, however in September or October of that year Russell walked in on McDaniel having sex with McCutcheon in their bedroom. RP 461, 729, 731. McDaniel

[1] The verbatim report of multiple pretrial and trial proceedings are contained in consecutively paginated volumes which are referenced herein as "RP" followed by page number. A volume containing pretrial hearings on June 10, 2010, and December 2, 2010 is referenced as "Pretrial RP (1)" followed by page number. Two subsequently transcribed volumes are referenced as follows: a volume containing hearings on February 24, July 19, September 9, and November 2, 2010, is referenced as "Pretrial RP (2)" followed by page number. A volume containing a hearing on January 6, 2011, is referenced as "Pretrial RP (3)" followed by page number.

deeply regretted this event, as he loved Russell, not McCutcheon. RP 734.

Nevertheless, because of the incident, Russell moved out of the home she shared with McDaniel and in with her father, along with her daughter Hailey. RP 731. Despite the sexual encounter between herself and McDaniel, McCutcheon still brought C.D. over to Russell's home regularly, at least four times a month. RP 453. C.D. would spend the night and would sleep in Russell's daughter's room. RP 454, 737. Russell had the sense that she was being used as a babysitter. RP 463. Indeed, the sexual encounter that Russell witnessed between McDaniel and McCutcheon had no effect on the frequency with which McCutcheon brought C.D. to the home; the only difference was that Russell saw less of McCutcheon herself. RP 463.

Although Russell enjoyed having C.D., McCutcheon was frequently late coming to pick C.D. up, often days late. Id. When Russell would attempt to telephone her, McCutcheon would not answer her phone. Id. C.D. even spent Christmas in Russell's home. RP 454, 469. This visit was only supposed to last a couple of days, but it stretched into nearly two weeks. RP 469. When Russell telephoned McCutcheon, McCutcheon told her she was

fine with C.D. staying longer in Russell's home because C.D. was enjoying her visit. Id. McCutcheon finally took C.D. home on Christmas Day, 2007. Id.

Even when Russell had her own son, in January, 2008, McCutcheon continued to bring C.D. over to Russell's home. RP 471. C.D. came four or five more times to the home before the visits suddenly stopped. Id.

In approximately February 2008, McCutcheon telephoned Russell and McDaniel and reported that C.D., then three years old, told her McDaniel had put hand sanitizer on his hand and touched "her private." RP 350, 475. Russell did not believe this allegation and told her McDaniel had done no such thing, and to take C.D. to a doctor. RP 475. Russell believed that the source of the allegation stemmed from an incident in which McDaniel's daughter, Shanyce McDaniel, who was older than Hailey, had been bullying the younger girls. Shanyce put hand sanitizer in Hailey's mouth and C.D. witnessed this. RP 474-75, 702. Russell explained to McCutcheon that she believed this incident was the basis for C.D.'s report. RP 475.

McDaniel spoke to McCutcheon on the telephone during the same call. RP 476. He was shocked by McCutcheon's allegation.

He told McCutcheon she'd "lost her mind." RP 751. He had known C.D. since she was a year and a half old and regarded her as a daughter. RP 673, 726, 738. Other people who observed C.D. and McDaniel interact saw that she was emotionally attached to him, and did not seem fearful or behave unusually around him. RP 673.

Further, in the small home that Russell shared with her father, McDaniel had little opportunity to even be alone with C.D. RP 689, 741-42. Due to a difficult pregnancy, Russell was home almost all the time during the pertinent time period, and after her son was born she continued to spend most of her time at home. RP 694, 742. McDaniel's own daughter, Shanyce, visited frequently. RP 674, 697. Everyone in the home except Russell's father shared a bathroom. RP 678. When C.D. needed to use the bathroom, if Russell was not at home, Shanyce or Hailey would help her. RP 688.

McCutcheon did not notify law enforcement about C.D.'s disclosure, nor did she take C.D. to a doctor. RP 353, 375. She did stop bringing C.D. to Russell's home, however, so from approximately February 2008 C.D. did not see McDaniel anymore. RP 471.

16 months after the initial allegation, on June 14, 2009, C.D. again mentioned something about an incident involving "Dennis." RP 385, 426. C.D. lived part of each week with her paternal grandmother, Maria Del Carmen. Del Carmen had a contentious relationship with McCutcheon. RP 424. Like Russell, Del Carmen found McCutcheon unreliable and inconsistent about maintaining a schedule with regard to C.D.'s visits. RP 434.

On June 14, 2009, C.D. and Del Carmen were driving back from the park when C.D. asked Del Carmen to pull over so she could urinate. RP 427. Allegedly, immediately afterward C.D. said, "Dennis touched me here," and pointed to her vagina. Id.

On or around the same day, C.D. also spoke to Shaheerah, her older half-sister, who lived with Del Carmen. According to Shaheerah, C.D. said, "Shaheerah I have something to tell you but don't tell Grandma." RP 404. She then said that "Dennis" touched her "private part." Id. She said that he touched her with hand sanitizer. RP 405-06.

Elizabeth Wendell, a volunteer with Big Brothers Big Sisters and Shaheerah's mentor, came to Del Carmen's house on June 14, 2009. RP 548. She overheard C.D. say, "I put hand sanitizer on my private," and responded, "That must have hurt." Id. Later that

day, C.D. said, "Dennis put hand sanitizer on my privates." RP 551. Because Wendell was a mandatory reporter, she reported C.D.'s statements to CPS. RP 554.

C.D. did not see a physician until July 27, 2009. RP 630. Harborview Sexual Assault Center attending physician Rebecca Wiester conducted an interview of C.D., which Wiester commenced by saying that kids talk to her about things that happen that are not okay. RP 634. C.D. responded that something had happened to her that was not okay, and that someone "got on" her "private." Id. She said it was "Dennis," a grown-up. RP 635.

Wiester asked C.D. if he had touched her private, and she nodded affirmatively and said he touched her with his fingers over her underwear. RP 636-37. She said it did not hurt. RP 637. C.D. also told Wiester that he had punched her in the mouth once, and that when he was touching her, Teresa's father came over and watched it happen. RP 638.

Wiester's physical examination of C.D. did not show any signs of abuse. RP 642. In discussing C.D.'s statements to her, Wiester articulated concerns regarding the reliability of very young children. RP 645. Wiester stated that she herself did not feel competent to interview a three-year-old, and that had C.D. been

brought to the clinic one and a half years earlier, when the abuse allegedly occurred, Wiester would not have interviewed her. Id.

That summer, C.D. also went to see a therapist, Cassandra Ellsworth, employed by Kent Youth and Family Services. RP 526. What C.D. stated to Ellsworth about the alleged incident differed materially from what she had said to Wiester and to her family members.

C.D. said that "Dennis" had touched her "privates" three times, and pointed to her vagina. RP 533. She said that Shanyce and Hailey were present, and that the incident had happened at a friend's house. RP 534. Ellsworth specifically understood that the two other girls were in the same room. RP 535. At the commencement of the sessions, McCutcheon gave Ellsworth an account of the background circumstances leading to the referral in C.D.'s presence. RP 538. McCutcheon was also present during the sessions themselves. Id.

When the police investigation of the incident commenced, C.D. was referred for an interview by a forensic child interviewer, Cornelia Thomas, at the Children's Advocacy Center ("CAC") in Kent, Washington. RP 566-67. Thomas also conceded that at the

time when the interview was conducted, CAC had a policy not to interview children under the age of four. RP 588, 590.

Nevertheless, Thomas conducted an interview of C.D. In that interview, for the first time, C.D. referred to two alleged incidents; two separate instances of touching. RP 586.

Based upon this allegation, McDaniel was convicted by a Pierce County jury of child molestation in the first degree[2] and received an indeterminate sentence of 160 months incarceration to life. CP 130, 136, 140. McDaniel appeals. CP 155.

D. ARGUMENT

1. THE ADMISSION OF EVIDENCE THAT VOUCHED FOR THE COMPLAINANT'S CREDIBILITY AND THE VERACITY OF HER ALLEGATIONS DENIED MCDANIEL THE FAIR TRIAL GUARANTEED HIM BY THE FOURTEENTH AMENDMENT AND RIGHT TO TRIAL BY JURY PROVIDED BY THE SIXTH AMENDMENT AND ARTICLE I, SECTIONS 21 AND 22.

a. The trial court permitted the State's forensic interviewer to offer testimony that vouched for the credibility of the complainant. Pretrial, McDaniel moved to exclude evidence from the State's forensic interviewer on the grounds that the evidence vouched for the credibility of C.D.'s allegation. RP 70-71, 246. In

[2] McDaniel was charged in the alternative with one count of rape of a child in the first degree, but was acquitted of that count. CP 129.

particular, McDaniel contended that by going through "truth/lie" exercises with the child and testifying regarding the reason and purpose for these exercises, the interviewer was improperly bolstering the child's testimony. RP 246. To the extent that the court permitted the forensic interview to be introduced at trial, McDaniel asked the court to limit the presentation of this evidence to the substantive portion of the interview, and to exclude the rapport-building exercise. RP 244. The State objected to McDaniel's motion, contending that this portion of the tape was necessary to present a "complete picture" to the jury. RP 244.

The court denied the motion to exclude, ruling:

> I'm going to allow it, the full video. And the reason is that I think it provides context. With a child witness, it makes no sense to me to jump straight into the key issues which are her recitation of the facts of what happened. It seems to me it's going to be a stilted presentation otherwise. And for the same reason, I'm likely to allow the State some leeway when they do the same thing.

RP 248.

Accordingly, Thomas testified that it is "really important that the child understand the difference between truth and lie and what's right or wrong." RP 570. She explained that employing a rigorous "truth/lie" discussion had enabled her to discover instances where

children did not tell the truth. RP 570-71. Thomas also characterized her forensic interview of a child as the child's "witness statement . . . to find out whether or not there is a crime that happened." RP 573. She said it was important to have someone "trained . . . to go in and find out that information from a child." Id.

Thomas explained that she received information regarding the underlying allegation before the interview, so that when the child started to disclose information, Thomas would know she was on the "right track." RP 577. Thomas also offered testimony to 'explain' the 16-month gap between the time of McDaniel's last interaction with C.D. and her disclosure, stating, "out of the 1500 abuse cases that I have done, most of the time the child has disclosed after the abuser has left the home, moved away, no longer has access to the child." RP 580. The forensic child interview was played in its entirety for the jury. RP 586.

b. The admission of the evidence violated McDaniel's right to a jury trial. The right to a jury trial is "the very palladium of free government." State v. Montgomery, 168 Wn.2d 577, 589 n. 1, 183 P.3d 267 (2008) (quoting The Federalist No. 83 (Alexander Hamilton), as quoted in William L. Dwyer, In the Hands of the

People 1 (2002)). The United States Supreme Court has long barred the expression of such opinions as they invade the province of the jury. United States v. Spaulding, 293 U.S. 498, 506, 55 S.Ct 273, 79 L.Ed 617 (1985); U.S. Const. amend. VI. Under Washington's constitution, the role of the jury is to be held "inviolate." Const. art. I, §§ 21, 22.

Although the absolute prohibition on the admission of opinion testimony has been relaxed somewhat, the Washington Supreme Court has identified areas that are "clearly inappropriate" for witness opinion testimony. Montgomery, 163 Wn.2d at 591. "Among these are opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses." Id.

In the context of a prosecution for a child sex offense, testimony and evidence such as the evidence relating to the forensic interview here may constitute impermissible opinion testimony and vouching. State v. Black, 109 Wn.2d 336, 348-49, 745 P.2d 12 (1987) (expert's testimony that complainant suffered from "rape trauma syndrome" carried with it "an implied opinion that the alleged victim is telling the truth and was, in fact, raped" and amounted to an opinion as to the defendant's guilt); State v.

Johnson, 152 Wn. App. 924, 930-31, 219 P.3d 958 (2009) (admission of defendant's wife's out-of-court statement regarding the truthfulness of the charges was collateral, highly prejudicial, and a manifest constitutional error that could be raised for the first time on appeal); State v. Alexander, 64 Wn. App. 147, 154, 922 P.2d 1250 (1992) (by stating that child was not lying about sexual abuse, officer "effectively testified" he believed defendant was guilty); State v. Fitzgerald, 39 Wn. App. 652, 657, 694 P.2d 1117 (1995) (error to permit pediatrician to express opinion regarding child complainant's veracity); but cf., State v. Warren, 154 Wn. App. 44, 52-53, 138 P.3d 1081 (2006) (suggesting that such testimony may be improper but in the absence of an objection does not rise to the level of manifest constitutional error), affirmed on other grounds, 165 Wn.2d 17, 195 P.3d 940 (2008).

The prosecutor made the forensic interview a central focus of the State's case, playing the video of the interview not once but twice. RP 582, 803. The prosecutor pointed out in her closing argument that in the forensic interview, C.D. said her statements were true. RP 797. The forensic interviewer, a witness who, by her own testimony, had conducted 1500 interviews, essentially testified that her truth/lie discussion aids her to ferret out when children are

being truthful and when they are not. RP 570-71. In short, the testimony was improper under the many decisions censuring the admission of opinion testimony, and should have been excluded.

c. The State's case was otherwise flimsy and the admission of the evidence denied McDaniel a fair trial. The forensic interviewer's testimony and the video evidence were key to bolstering the State's case, which otherwise had substantial defects. There was no physical corroboration of C.D.'s allegations. There were no witnesses to the alleged conduct. The several witnesses who resided in or frequented Russell's home at the time the abuse allegedly occurred rejected the idea that it could have happened because the home was crowded, C.D. was never or rarely alone with McDaniel, and McDaniel was not the person who helped her in the bathroom. Far from being consistent, C.D.'s account of what allegedly had happened to her varied widely depending on who she was speaking to. Indeed, the very fact of the 16-month delay between the two disclosures was peculiar, and not explained by Thomas' testimony regarding possible reasons for delayed disclosures, as McDaniel did not have access to her during that entire period.

Article I, section 21 and the Sixth and Fourteenth Amendments guarantee an accused person the right to a fair trial by an impartial jury. "Lay witness opinion testimony about the defendant's guilt invades this right," and is prejudicial. Johnson, 152 Wn. App. at 934. This Court should conclude the improper opinion testimony denied McDaniel a fair trial.

2. THE TRIAL COURT ERRED IN BARRING MCDANIEL FROM INTRODUCING EVIDENCE OF THE COMPLAINANT'S MOTHER'S ERRATIC LIFESTYLE AND ENSUING CPS INVESTIGATION.

a. Because C.D.'s credibility and veracity were central issues at trial, McDaniel sought to introduce evidence of McCutcheon's erratic parenting and the ensuing CPS investigation. Pretrial, McDaniel sought leave to introduce evidence that during the time surrounding the charged incident, Rachel McCutcheon had been leading an erratic life, which led CPS to commence an investigation of her fitness as a parent.

McCutcheon in fact had a serious substance abuse problem that began in her teens with the use of marijuana. RP 153. By the time McCutcheon was 21, she was using heroin. McCutcheon used drugs at least weekly. RP 158. She started taking methadone in 2009. RP 155. McCutcheon also abused

prescription pain pills, which she claimed she stopped using following C.D.'s initial disclosure. RP 181. McCutcheon also worked as a stripper at a club in Seattle, which meant that she kept unusual hours. RP 282.

Wendell, Shaheerah Davis's mentor through Big Brothers Big Sister, said that during her contacts with McCutcheon, she observed erratic behavior. RP 130. Wendell described McCutcheon's demeanor as "inconsistent and unstable," and Wendell suspected McCutcheon was using drugs. RP 128. On one occasion, Wendell observed McCutcheon passed out on the couch. RP 129.

In fact, the allegation of sexual abuse was not the sole time that Wendell made a report to CPS regarding C.D., as Del Carmen had informed Wendell that C.D. was being dropped off without having been bathed and sometimes without clothes. RP 131. Additionally, Del Carmen reported to Wendell that C.D. was displaying troubling issues regarding her bladder control. RP 131, 231. She would urinate on herself and/or go to the bathroom at inappropriate times. RP 131, 230.

Following the report of the allegation regarding McDaniel to CPS, CPS commenced an investigation of McCutcheon. The

investigation resulted in a finding on July 13, 2009, that McCutcheon was negligent in parenting C.D., on the basis that her judgment regarding the allegations of sexual abuse was impaired by her substance use. RP 182-83. CPS was involved with McCutcheon for 15 months. RP 183.

McDaniel contended the relevance of this evidence "would be to demonstrate the home environment that [C.D.] was exposed to at a time that immediately precedes her first disclosure[.]" RP 283. He noted that she was working four nights as a week as a stripper until 2:00 a.m. and was using heroin up until that time period. Id.

He contended, "[C]hildren don't make these statements in a vacuum" and noted that C.D. was being neglected, possibly as a result of the drug use. RP 284. He suggested that C.D. may have made the allegations to get her mother's attention, or possibly as a result of the neglect. Id. McDaniel contended that the CPS investigation was relevant with regard to McCutcheon's drug abuse during the pertinent period, and further that the CPS investigation gave McCutcheon an incentive to be dishonest with regard to McDaniel. RP 297-98.

The court barred all such evidence, which it characterized as "lifestyle" evidence. RP 288. The court "liken[ed] that to rape shield" and opined that absent evidence C.D. was actually exposed to pornography and the like, the evidence was "too attenuated" from the allegations underlying the case. RP 288-89.

For similar reasons, the court severely limited the extent to which McDaniel would be permitted to introduce evidence of the CPS investigation. RP 291, 296. The court ruled, "[G]etting into the CPS investigation is simply a backdoor way of talking about her lifestyle and I'm not going to allow that." RP 296.

b. The prosecutor capitalized on the *in limine* order by urging the jury to conclude signs of stress exhibited by C.D. were due solely to the alleged abuse. Having prevailed on the court to exclude evidence of McCutcheon's drug abuse, neglect, and erratic lifestyle, the prosecutor then took advantage of the court's ruling. During McCutcheon's trial testimony, the prosecutor elicited evidence that during the time period of the second disclosure, C.D. was "having problems": she was wetting herself, she was "antsy," and she seemed like she was having trouble sleeping. RP 358. McCutcheon stated earnestly that C.D. was getting better with counseling. RP 360.

The prosecutor also elicited testimony from Shaheerah Davis that C.D. was having problems with bedwetting during this time period. RP 418. Likewise, Del Carmen testified that "months before" June 14, 2009 (the day that C.D. alleged she was touched by "Dennis"), C.D., who had been potty-trained, had started wetting her pants again. RP 427. Del Carmen speculated that C.D. could control her bedwetting a little bit better after the disclosure. RP 432.

Ellsworth, the therapist at Kent Youth and Family Services, suggested that there could be a link between the alleged abuse and C.D.'s bladder control issues. RP 530, 541-42. She stated that bedwetting in small children can, but does not always, signify sexual abuse. RP 541. Ellsworth acknowledged on cross-examination that McCutcheon did not discuss any bedwetting or other related issues occurring less than two months before the commencement of therapy, in July 2009. RP 539. Wiester also stated that bedwetting is a nonspecific indicator of anxiety, although not necessarily of sexual abuse. RP 648.

In her closing argument, the prosecutor contended that the bedwetting behavior was something that the jury should consider in deciding whether the allegations were true. The prosecutor argued:

> Fully toilet trained and begins wetting the bed. C.J. Ellsworth was here and said yes, it can be relevant in treating someone's mental health, can be part of anxiety, it's simply something noteworthy, less so obviously to the medical professionals.

RP 797.

c. McCutcheon's erratic lifestyle and neglect of C.D were relevant to the jury's assessment of C.D.'s credibility and the ruling barring McDaniel from presenting this evidence denied him his Sixth Amendment right to a defense.

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process and Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."

Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)).

> The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.

State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (quoting Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)). The right to present a defense, therefore, is

intimately connected to an accused person's right to present all relevant evidence bearing on the credibility of the State's allegations. ER 401; ER 402.

Relevancy is a low bar. "Even minimally relevant evidence is admissible." State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Moreover, where an accused person's right to present a defense is at stake, the court must be very careful not to exclude even minimally relevant evidence. Id.

Where the right to a defense is implicated, the court must apply a three-part test to determine if the evidence may be excluded.

> First, the evidence must be of at least minimal relevance. Second, if relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Finally, the State's interest to exclude prejudicial evidence must be balanced against the defendant's need for the information sought, and only if the State's interest outweighs the defendant's need can otherwise relevant information be withheld.

Darden, 145 Wn.2d at 622 (citing State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983)).

i. The trial court employed an incorrect legal standard in excluding the evidence. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. State v.

Bashaw, 169 Wn.2d 133, 140, 234 P.3d 195 (2010). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. An abuse of discretion also occurs when the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. State v. Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007).

The trial court likened the evidence undermining McCutcheon's credibility to "rape shield" evidence and excluded it on this basis. RP 288. This ruling mistook the purpose and thrust of RCW 9A.44.020, the "rape shield" law, and denied McDaniel his right to a defense.

RCW 9A.44.020 provides in relevant part that in a prosecution for a sex offense:

> Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent . . .
>
> In any prosecution for the crime of rape or for an attempt to commit, or an assault with an intent to commit any such crime evidence of the victim's past sexual behavior including but not limited to the

> victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim[.]

RCW 9A.44.020(2); (3) (emphasis added).

By its plain terms, application of the statute is limited to the complaining witness. State v. Aguirre, 168 Wn.2d 350, 362, 229 P.3d 669 (2010). The statute's focus is on whether "the [victim's] consent to sexual activity in the past, without more, makes it more probable or less probable that [he or] she consented to sexual activity on this occasion." State v. Gregory, 158 Wn.2d 759, 785, 147 P.3d 1201 (2006) (quoting Hudlow, 99 Wn.2d at 10).

McCutcheon was not the complaining witness in this case. The issue was not consent. The evidence McDaniel sought to introduce was not evidence of McCutcheon's prior sexual activity. Rather, the question was whether McCutcheon herself was a reliable witness and able to offer credible testimony regarding C.D.'s alleged disclosures. Given McCutcheon's drug addiction, the finding that she was negligent in parenting C.D., and her 15-month involvement with CPS, McCutcheon had an incentive to cooperate with the State's prosecution of McDaniel and offer testimony favorable to the State's case. Indeed, McCutcheon's

bias was evident; before C.D. testified McCutcheon told her that she was going to "take Dennis to jail." RP 343.

Additionally, because of C.D.'s extreme youth when she was alleged to have reported the incident, both the existence of the incident and C.D.'s ability to relate it accurately were issues at trial. See RP 383 (McCutcheon acknowledges that because of C.D.'s age, she had doubts regarding the truth of the first disclosure); RP 567-68 (forensic interviewer Thomas explains that it is important that the child lead the interview, not the forensic interviewer, and that leading questions not be asked); RP 652 (Wiester testifies that very young children are not necessarily reliable reporters).

It is beyond reasonable dispute that children, especially young children, are highly suggestible, and myriad improper influences can impact their recollection of an incident or even create false memories. See e.g. Maggie Bruck & Stephen J. Ceci, Amicus Brief for the Case of the State of New Jersey v. Michaels Presented by Committee of Concerned Social Scientists, 1 Psychol., Pub. Pol'y & L 272, 272-73 (1995) (meta studies indicate that "in a variety of conditions, young children are more suggestible than adults with preschoolers being more vulnerable than any other age group").

In short, the evidence McDaniel was barred from presenting bore directly upon the credibility to C.D.'s allegations and McCutcheon's bias. The evidence was relevant and the State did not show that its admission bore directly on the integrity and fairness of the fact-finding process. This Court should conclude the order excluding the evidence denied McDaniel his right to a defense.

ii. The prosecutor improperly exploited the court's ruling barring the evidence to urge improper inferences from the signs of anxiety exhibited by C.D. Washington courts recognize that in child molestation prosecutions, eyewitness or physical corroboration is generally unavailable because sexual offenses against children tend to involve nonviolent conduct. State v. Thorgerson, 172 Wn.2d 438, 442 n. 1, 258 P.2d 43 (2011) (citing cases). Presumably because of the lack of corroboration in this case, the prosecutor took advantage of the order disallowing McDaniel from introducing evidence of McCutcheon's erratic lifestyle and neglect of C.D. to imply that the resurgence of her bedwetting and bladder control issues was due to sexual abuse. See e.g. RP 628, 630 (prosecutor elicits evidence from child therapist that C.D. was referred because of "inappropriate touch" by

a family friend and that there was a related concern because the child had started wetting the bed after completing potty training and was displaying other behavioral issues); RP 648 (prosecutor asks Wiester whether McCutcheon made her aware of C.D.'s bedwetting behavior); see also id. (prosecutor asks, "if . . . you were told that a child was coming in who was the suspected victim of sexual abuse had been wetting the bed, would that be medically relevant to you?").

In fact, as Wiester testified, this kind of behavior is a nonspecific indicator of anxiety. RP 648. But the jury was not made aware of any other potential sources for C.D.'s anxiety. The jury instead was prevented from hearing about McCutcheon's drug abuse, erratic hours, and neglect (including a founded finding of neglect by CPS) which bore equally upon the potential cause of the renewed bedwetting. A reasonable jury could conclude that any or all of these circumstances could cause a pre-schooler to begin bedwetting again after completing potty training. But without this alternative explanation, the bedwetting appeared to corroborate the otherwise unsubstantiated allegation of sexual abuse.

Like all lawyers, a prosecuting attorney has a duty of candor to the tribunal. RPC 3.3. A prosecutor also has a duty to ensure that an accused person receives a fair trial.

> A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice . . . Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated.

State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011) (citations omitted).

A prosecutor's misuse of evidence may constitute misconduct that denies an accused person a fair trial. See e.g. State v. Fisher, 165 Wn.2d 727, 747-48, 202 P.3d 937 (2009) (prosecutor's misuse of ER 404(b) evidence admitted for a limited purpose required reversal); State v. Jones, 144 Wn. App. 284, 292-93, 183 P.3d 307 (2008) (reversing conviction where prosecutor committed misconduct by improperly bolstering credibility of chief witness by alluding to facts not in evidence).

This Court should conclude that the prosecutor's concerted effort to persuade the jury that C.D.'s bedwetting was caused by the alleged inappropriate touch by McDaniel was misconduct, given

the highly plausible alternative explanation for this behavior that the prosecutor successfully was able to exclude from the trial. In light of the child's extreme youth, the lack of other corroboration, the evidence tending to show that McDaniel would not have had an opportunity to commit the offense, and, and the child's many and varied stories about what allegedly had happened to her, this Court should conclude the prosecutor's misuse of the bedwetting evidence denied McDaniel a fair trial. McDaniel's conviction should be reversed.

3. THE EIGHT CONTINUANCES, TO WHICH MCDANIEL OBJECTED, WERE GRANTED WITHOUT GOOD CAUSE AND VIOLATED MCDANIEL'S RIGHT TO A SPEEDY TRIAL.

a. The court granted eight continuances before McDaniel was tried, all over McDaniel's objections. McDaniel was arraigned on the initially-filed information on December 30, 2009. Continuances were subsequently granted, over McDaniel's objections, on June 10, 2010, July 19, 2010, September 9, 2010, November 2, 2010, December 2, 2010, and January 6, 2011.[3]

[3] The docket suggests a continuance was granted on February 24, 2010, and at the hearing on July 19, 2010, the prosecutor stated two prior continuances had been granted. Pretrial RP (2) 4. Likewise the court stated, on January 6, 2011, that seven prior continuances had been granted. Pretrial RP (3) 6. There was no on the record hearing on February 24, 2010 or September 9, 2010.

Pretrial RP (1) 3-5, 7-13; Pretrial RP (2) 8, 14, 16; Pretrial RP (3) 5.

The reasons given for each continuance were as follows:

> **February 24, 2010**: [No hearing on the record.]
>
> **June 10, 2010**: State had provided new discovery to defense; witness interviews were not completed. Both counsel were in agreement regarding the continuance, although McDaniel objected. Pretrial RP (1) 3-4. The court found good cause for the continuance based on the incomplete discovery and witness interviews. Pretrial RP (1) 5.
>
> **July 19, 2010**: State witnesses Wendell and Shaheerah Davis were unavailable. Pretrial RP (2) 4. The State acknowledged two prior continuances had been granted and the case was 211 days old. Id. Both McDaniel and his counsel objected, although defense counsel stated that he believed there was good cause for the continuance. Pretrial RP (2) 5-6, 8-9. Although the prosecutor stated she had been in contact with Wendell, she did not indicate Wendell had been subpoenaed.
>
> **September 9, 2010**: [No hearing on the record.]
>
> **November 2, 2010**: The State wanted to obtain records regarding a King County case that was the subject of a motion under RCW 10.58.090;[4] those records were archived. Defense counsel had a vacation scheduled in November. The court granted the continuance while noting that McDaniel was frustrated with the delays. Pretrial RP (2) 5.
>
> **December 2, 2010**: A continuance was sought because defense counsel was in trial on another

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Nevertheless, it appears the court granted a total of eight continuances over McDaniel's objection.

[4] The RCW 10.58.090 motion was unsuccessful.

matter and had county-mandated leave following the trial. Pretrial RP (1) 7-9. The court granted a continuance until January 6, 2011. Pretrial RP (1) 11-12.

January 6, 2011: The courtroom preassigned to hear the case was presiding over another trial. Pretrial RP (3) 6. The court did not make a record of unavailability of other courtrooms prior to granting the continuance. Pretrial RP (3) 6-7.

b. In granting the continuances over McDaniel's objection, the court abused its discretion. An accused person's right to a speedy trial is protected by both the federal and state constitutions. U.S. Const. amend. VI; Const. art I, §§ 10, 22. Consistent with the framers' intent, the right also has long been protected by statute and court rule. Code 1881, § 772 (providing that if defendant under indictment whose trial has not been continued not brought to trial at next regular term, indictment must be dismissed); 2 Hill's Ann. St. § 1369 (adopting 60-day speedy trial expiration date, and requiring dismissal where case tried beyond expiration without good cause) Ballinger's Ann. Codes & St. § 6911, Pierce's Code, § 1531 (same); see also, Rem.Rev.Stat. § 2312 (same); State v. Parmeter, 49 Wash. 435, 437, 95 P. 1012 (1908) (observing statute enacted for the purpose of enforcing the constitutional speedy trial right contained in article. I, § 22); State v.

Hoffman, 150 Wn.2d 536, 539, 78 P.3d 1289 (2003) (adult and juvenile speedy trial rules designed to protect constitutional right to speedy trial).

According to CrR 3.3, our current court rule, an accused person who is in custody must be brought to trial within 60 days of arraignment. CrR 3.3(b)(1)(i). Continuances may be granted over a party's objection only if such continuances are required by the administration of justice. CrR 3.3(f). If a trial is not brought within the time limits prescribed by CrR 3.3 the charges must be dismissed with prejudice. CrR 3.3(h).

Routine court congestion is not a permissible reason for a continuance. State v. Mack, 89 Wn.2d 788, 576 P.2d 44 (1978). And, although a continuance may be justified in the administration of justice, the mere invocation of the words will not serve as a blind absent a legitimate reason to delay an accused person's trial. State v. Nguyen, 131 Wn. App. 815, 820-21, 129 P.3d 821 (2006) (continuance not justified where granted to 'track' defendant's case with unrelated charges).

Washington courts have consistently sanctioned dismissal as a remedy for violations of the speedy trial right, even where no prejudice occurred as a result of the violation. See e.g. Mack,

supra; approved by State v. Dearbone, 125 Wn.2d 173, 180, 883 P.2d 303 (1994); accord State ex rel Moore v. Houser, 91 Wn.2d 269, 274, 588 P.2d 219 (1978); State v. Edwards, 94 Wn.2d 208, 215, 616 P.2d 620 (1980) (holding strict rule necessary to preserve integrity of judicial process and compliance with constitutional guarantee).

Where docket congestion or courtroom management has been the reason for a continuance, the courts have specifically required that (1) good cause be shown on the record for the finding and (2) the finding be tied to specific, articulable facts, rather than a generalized assertion. State v. Kenyon, 167 Wn.2d 130, 134, 216 P.3d 1024 (2009) (reversing where trial court continued trial because trial judge was in a criminal trial and second county judge was on vacation; the "trial court should have documented the availability of pro tempore judges and unoccupied courtrooms" because, pursuant to CrR 3.3(f), it is "required to 'state on the record or in writing the reasons for the continuance' when made in a motion by the court or by a party"); State v. Cannon, 130 Wn.2d 313, 327, 922 P.2d 1293 (1996) (reaffirming that a generalized assertion of docket congestion is not good cause for continuance); State v. Smith, 104 Wn. App. 244, 251-52, 15 P.3d 711 (2001)

(routine court congestion not good cause for continuance); State v. Warren, 96 Wn. App. 306, 309, 979 P.2d 915 (1999) (Courtroom unavailability is synonymous with court congestion) (citing, State v. Kokot, 42 Wn. App. 733, 737, 713 P.2d 1121 (1986)).

While not conceding the propriety of any continuances in this case, at least four are particularly troubling given the strict demands of the speedy trial rule. First, no hearings were transcribed on February 24, 2010, or September 9, 2010. It is settled that due process entitles a criminal defendant to a "record of sufficient completeness" to present errors to the appellate court. Draper v. Washington, 372 U.S. 487, 497, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963); see also State v. Saunders, 153 Wn. App. 209, 219-21, 220 P.3d 1238 (2009) (continuances granted without adequate explanation were abuse of discretion). To the extent that the court failed to make an adequate record of the reasons to continue the case over McDaniel's objection, McDaniel is entitled to reversal of his conviction and dismissal with prejudice.

Second, with regard to the July 19, 2010 continuance, the prosecutor made no showing that she had properly subpoenaed the allegedly necessary witnesses. See State v. Wake, 56 Wn. App.

472, 473, 476, 783 P.2d 1131 (1989) (continuance improper where State did not subpoena unavailable witness).

Third, with regard to the continuance on January 6, 2011, which was granted because the assigned judge was in trial on another matter, the court made no record of why another courtroom could not hear the matter, or that other courtrooms were unavailable. Compare Saunders, 153 Wn. App. at 220-21; Warren, 96 Wn. App. at 309.

c. The remedy is dismissal with prejudice. The remedy for a violation of the speedy trial right contained in CrR 3.3 is dismissal with prejudice. In Saunders, this Court held that "absent convincing and valid reasons for the continuances . . . the trial court's orders granting the three continuances were 'manifestly unreasonable, [and] exercised on untenable grounds[and] for untenable reasons.'" Saunders, 153 Wn. App. at 221. This Court should conclude that here, likewise, the continuances were not shown to be in the administration of justice. McDaniel is entitled to reversal of his convictions and dismissal with prejudice.

E. CONCLUSION

For the foregoing reasons, this Court should reverse McDaniel's conviction. Because McDaniel's speedy trial rights were violated, this matter must be dismissed with prejudice.

DATED this 30th day of November, 2011.

Respectfully submitted:

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Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 41885-1-II
v.	)	
	)	
DENNIS MCDANIEL,	)	
	)	
APPELLANT.	)	

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